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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. [redacted]
229

VANCE A. DOBBINS, JR., and JERRY CALVIN SMITH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit.

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TABLE OF CONTENTS.

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 3

Conclusion 7

Appendix:

Opinion of the United States Court of Appeals for the Fifth Circuit 9

Judgment of the United States Court of Appeals for the Fifth Circuit 11

Order of the Court of Appeals Denying Rehearing 11

TABLE OF AUTHORITIES.

Cases.

Baker v. U. S., 357 F.2d 11 ..... 4, 5

Blumberg v. U. S., 222 F.2d 496 4,5

Bollenbach v. U. S., 326 U.S. 607 4

Brock v. North Carolina, 344 U.S. 424 4

Brown v. Mississippi, 297 U.S. 278 ..... 4, 5

Gallaghan v. U. S., and Colwell v. U. S., 299 Fed. 172 4, 5

Grock v. U. S., 298 Fed. 544 ..... 4, 5

Hall v. State, 165 So. 2d 345 ..... 4, 5

Hellman v. U. S., 339 F.2d 36 ..... 4, 5

Henry v. U. S., 204 F.2d 817 ---- 4, 5
Herman v. U. S., 289 F.2d 362 ---- 4, 5
Herron v. So. Pac. Co., 283 U.S. 91 ---- 4
Hunter v. U. S., 62 F.2d 217 ---- 4, 5
Jackson v. U. S., 329 F.2d 893 ---- 4, 5
Jianole v. U. S., 299 Fed. 496 ---- 4, 5
Moore v. Dempsey, 261 U.S. 86 ---- 4, 5
People v. Mendes, 3 N.Y. 2d 120, 164 N.Y.S. 2d 401 ---- 4, 5
Quercia v. U. S., 289 U.S. 466 ---- 5
Rideau v. Louisiana, 373 U.S. 723 ---- 4, 5
Riley v. Goodman, 315 F.2d 232 ---- 4
Robertson v. State, 38 Tex. 187 ---- 4
Sunderland v. U. S., 19 F.2d 202 ---- 4, 6
U. S. v. Hill, 332 F.2d 105 ---- 4, 5
Wilson v. U. S., 250 F.2d 312 ---- 4

Other.

23 *C.J.S.*, Crim. Law, Sections 987, 989-991 and 993(b) ---- 5
88 *C.J.S.*, Trial, Sections 49-51 ---- 5
Rule 19 1(b) of the Supreme Court of the United States ---- 3
18 U.S.C.A. 2314 ---- 2, 6, 7
18 U.S.C.A. 2315 ---- 2, 3, 6, 7
28 U.S.C.A. 1254(1) ---- 2

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit.

Petitioners, Vance A. Dobbins, Jr., and Jerry Calvin Smith, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of Vance A. Dobbins, Jr., and Jerry Calvin Smith, Appellants, vs. United States of America, Appellee, No. 26,228 in that Court on March 12, 1969 and the order filed April 9, 1969 denying petition for rehearing.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto and identified as page 161 in Transcript of Record, Volume II, certified by the Clerk of the United States Court of Appeals for the Fifth Circuit.

In an order filed May 13, 1969, the appellants' motion for recall and stay of judgment, issued as mandate, was granted by the United States Court of Appeals for the Fifth Circuit.

JURISDICTION.

This Court's jurisdiction is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED.

The questions presented by this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit include:

1. The denial to the petitioners of their right to due process of law in a fair trial resulting from the repeated and constant gross interference and active participation of the Trial Judge in the trial to an extent so as to take over the conduct of the whole trial; and

2. The petitioners were charged with and convicted of violating 18 U.S.C.A. 2315, while the proof, if any, was relevant to 18 U.S.C.A. 2314, prescribing a separate and distinct offense.

STATUTORY PROVISIONS INVOLVED.

Petitioners were charged with an offense under 18 U.S.C.A. 2315, which provides:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any * * * money of the value of $5,000 or more, * * * moving as, or which are a part of, or which constitute interstate * * * commerce, knowing the same to have been stolen * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A. 2314, in contrast, provides that:

> "Whoever transports in interstate or foreign commerce any * * * money, of the value of $5,000 or more, knowing the same to have been stolen, * * *."

STATEMENT OF THE CASE.

Petitioners, both residents of Chattanooga, Tennessee, were indicted under 18 U.S.C.A. 2315 charged with unlawfully, wilfully and feloniously receiving, concealing, and storing * * * money of the value of in excess of $5,000.00, to wit, a rare coin collection, which was moving in interstate commerce from * * * Tennessee to * * * Florida * * * knowing the same to have been stolen.

The trial was had on May 1, 1968 before the Honorable Joseph P. Lieb, District Judge, at Tampa, Florida.

The jury returned a verdict of guilty of the offense charged on May 3, 1968 after two days of confusion, all as more particularly set out hereinafter, and as more fully illustrated by the constant intercession of the trial judge in criticising both counsel, admonishing witnesses, and completely taking over the case, the degree to which can be appreciated only by a reading of the transcript in its entirety. The influence on the jury was obvious.

REASONS FOR GRANTING THE WRIT.

The instant case illustrates the wisdom of this Court in providing, in Rule 19 1(b), for granting the writ of certiorari where a Court of Appeals has affirmed the actions of a District Judge in a trial which so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I.

An appreciation of how the Trial Judge "took over" the entire trial can only be achieved by a close scrutiny of the transcript. Isolated examples cannot demonstrate the impact upon the jury of the constant injection of authority, inquisitiveness, castigation of counsel, defendants, and

witnesses, and repeated caustic comments reflecting on the need for haste toward a conclusion. The hostility shown upon the trial is vividly depicted in the record despite the inanimateness of the printed pages in which, inherently, there is but slight opportunity to reflect the massive participation in and dominating impact of the caustic spoken words of the Trial Judge upon the jury.

The intrusions of the Trial Judge foreclosed impartiality. *Bollenbach v. U. S.*, 326 U.S. 607; *Wilson v. U. S.*, 250 F.2d 312; *Brock v. North Carolina*, 344 U.S. 424; *Riley v. Goodman*, 315 F.2d 232; *Herron v. So. Pac. Co.*, 283 U.S. 91; *Sunderland v. U. S.*, 19 F.2d 202; *Robertson v. State*, 38 Tex. 187; *Grock v. U. S.*, 298 Fed. 544; *People v. Mendes*, 3 N.Y. 2d 120, 164 N.Y.S. 2d 401; *U. S. v. Hill*, 332 F.2d 105; *Jackson v. U. S.*, 329 F.2d 893; *Hall v. State*, 165 So. 2d 345; *Baker v. U. S.*, 357 F.2d 11, at page 14; *Hellman v. U. S.*, 339 F.2d 36; *Herman v. U. S.*, 289 F.2d 362, at pages 365-366; *Moore v. Dempsey*, 261 U.S. 86; *Rideau v. Louisiana*, 373 U.S. 723, 726; *Brown v. Mississippi*, 297 U.S. 278, 285; *Jianole v. U. S.*, 299 Fed. 496, 499; *Gallaghan v. U. S.*, and *Colwell v. U. S.*, 299 Fed. 172, 175; *Henry v. U. S.*, 204 F.2d 817; *Hunter v. U. S.*, 62 F.2d 217, 220; *Blumberg v. U. S.*, 222 F.2d 496, 501.

Bollenbach and *Wilson* command a Trial Judge to be impartial, indifferent to the parties and cautious of any suggestion of partiality else the proceedings will be fatally infected. *Brock* and *Riley* are to the effect that judicial propriety must be measured on a case to case basis. *Herron* prescribes guidelines for judicial conduct. In *Sunderland* it is said that a trial judge should not constantly interrupt attorneys with admonitions to be brief, and, along with *Robertson*, dictate that even where the comments of the trial judge appear routine, when viewed independently, the aggregate may reveal a clear and con-

sistent pattern of judicial bias. *Grock* states that it is a fundamental right of a defendant, and his attorney, to be free of treatment by the trial judge which prejudices the rights of a defendant and is a matter of right not indulgence. Similarly, *People v. Mendes* commands this conduct by a trial judge to witnesses. *Hill* and *Jackson* criticize the taking over on cross-examination of witnesses by the trial judge. *Hall* illustrates the error attaching to a trial judge's conveyance of disbelief in a defendant's testimony. The Fifth Circuit in *Baker,* while reversing on other grounds, admonished the trial court not to do again on re-trial what he had done on the original trial. In *Hellman* Judge Gewin of the Fifth Circuit, cautioned that a trial judge must be abundantly careful to refrain from becoming an advocate. In *Herman,* Judge Wisdom of the Fifth Circuit, said "We do not approve of a trial judge asking so many questions that he appears to take the case away from the attorneys." *Moore* announces that a constitutionally unfair trial results where the barriers and safeguards are relaxed or forgotten, and becomes a spectacle (*Rideau*) or merely an ordeal (*Brown*) far short of a disciplined contest producing truth. *Jianole, Gallaghan* and *Colwell* all point up the impact of a trial judge's comment and conduct on a jury to the detriment of a defendant. *Henry,* and *Quercia v. U. S.,* 289 U.S. 466, 470 enunciate Chief Justice Hughes' condemnation of extra-judicial influences on a jury by the words and action of a trial judge. Oft repeated caustic comments from a trial-bench prejudices a jury. 88 *C.J.S.,* Trial, Sections 49-51 and 23 *C.J.S.,* Crim. Law, Sections 987, 989-991 and 993(b).

The instant transgressions of the trial judge are condemned under *Hunter* and *Blumberg* and are clearly distinguished from *Hellman.* Only by a reading of the tran-

script can the participation of the trial judge in the instant case be appreciated, and even then the demeanor and tone-implications cannot be ascertained on appeal as they were demonstrative before the jury.[1]

While the lifting from isolated context of one or more remarks by the trial judge may not afford criticism, when viewed in the aggregate record, a pattern of such conduct reveals a clear and consistent bias, subtle and unobtrusive but with a sum effect denying a fair trial. *Sunderland v. U. S., supra.*

II.

Petitioners stand convicted on a charge under 18 U.S.C.A. 2315. The offense proscribed there is receiving, concealing, storing, bartering, selling or disposing of money of the value of $5,000 moving as, or which is a part of interstate commerce, knowing it to have been stolen.

Significantly, and distinguished, is the offense proscribed by 18 U.S.C.A. 2314. The offense under Sec. 2314 is the transporting in interstate commerce of any money in an amount of $5,000 or more, knowing the money was stolen.

The money which is the subject matter of the act prohibited by Section 2315 is that which is moving in

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[1] See: R., p. 151, lines 13-14, A., p. 71, illustrative:
"Trial by Jury," Gilbert & Sullivan, circa 1876,
"* * * All the legal flurries seize you;
No proposal seems to please you;
I can't stop up here all day;
I must shortly go away; * * *."

Story of Gilbert & Sullivan. Goldberg, New York, Simon and Schuster 1928; R., p. 160, lines 20-22, A., p. 72, lines 4-6; R., p. 165, A., p. 75, lines 10-13; R., pp. 169-177, A., pp. 78-86, particularly R., p. 177, lines 6-22, A., p. 86, lines 7-24 in criticism of witness Dr. Anderson; R., pp. 433-434, A., pp. 144-146.

interstate commerce when obtained by the one so charged, while the act prohibited by Section 2314 is doing with it something chronologically subsequent to the act prohibited by Section 2315.

Two distinct acts are proscribed: the act prohibited by Section 2315 is the taking of the money from an interstate shipment, while the act prohibited by Section 2314 is doing something with the money after it is first obtained, hence the violation described in Section 2314 must of necessity occur subsequent to the taking of it from an interstate shipment. Had the Congress intended otherwise, there would have been no need to enact two sections, one would have sufficed; hence the legislative intent was to provide for two distinct crimes, neither of which is included in the other.

While there may have been a possible assumption by the jury, under the proof adduced in this case, to reach a verdict of guilty under Section 2314, there was a total absence of proof as to a violation of Section 2315 as charged in the indictment.

The charge in the indictment, for which the petitioners stand convicted, is wholly different than the proof adduced. The petitioners stand convicted of one offense while the proof went to another, hence the verdict is not responsive to the indictment. The conviction of petitioners upon a charge not included in the indictment is error.

CONCLUSION.

This Honorable Court should grant this petition for a writ of certiorari to review the errors of the Court of Appeals for the Fifth Circuit in affirming the conviction of petitioners resulting from the errors committed in the District Court, doing so particularly in the exercise of this

Court's exercise of the power of supervision of the lower courts' conduct.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

VANCE A. DOBBINS, JR., and JERRY CALVIN SMITH,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Middle District of Florida.

(March 12, 1969)

Before PHILLIPS,* BELL and MORGAN,
Circuit Judges.

PER CURIAM: This is an appeal by Vance A. Dobbins, Jr., and Jerry C. Smith from a jury conviction of having violated 18 U.S.C. § 2315. The crime involved is the receiving and concealing more than $5,000.00 in stolen goods, which goods constitute interstate commerce, and knowing the same to have been stolen. The goods are rare coins which had been stolen from a coin collector named Anderson in Chattanooga, Tennessee, in December, 1966. The estimated value of the coins was $225,000.00, including 189 rolls of one-cent pieces with a market value in excess of $41,000.00.

Bernhard Gould, a coin dealer in Sarasota, Florida, stated under oath that coins of the same description as that of the stolen coins were presented to him by the

* Judge Phillips of the Tenth Circuit, sitting by designation.

defendants. Some of the rolls of coins that defendants attempted to sell had Anderson's name written thereon. However, no sale was consummated. Additionally, Edward Brody, a Rossville, Georgia, jeweler, who had been previously convicted of his part in the same crime, testified that Dobbins stated the coins had previously been in Florida, that the asking price for the coins was $40,000.00, and that the coins he saw matched the coins stolen from Anderson in several particulars. As a defense, Dobbins took the stand to deny the statements made by the witnesses for the prosecution. Smith did not testify.

Both Dobbins and Smith allege various errors committed by the trial Court, none of which are well taken. As to the allegation that the comments of the judge were prejudicial, we dismiss such claim as spurious on its face. The trial Court did not abuse its discretion to direct the trial in an orderly manner. *Hellman v. United States,* 339 F. 2d 36 (5 Cir., 1964). Moreover, a review of the record reveals ample evidence to support a denial of a motion for a directed verdict [i.e. judgment] of acquittal. The facts outlined above need not be restated. *Jones v. United States,* 391 F. 2d 273 (5 Cir., 1968).

The third contention that it was erroneous to admit Edward Brody's testimony is equally groundless. Such testimony had a proper place in the trial.

The decision of the District Court is affirmed as to all issues presented on appeal.

AFFIRMED.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

(March 12, 1969.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

ORDER OF THE COURT OF APPEALS DENYING REHEARING.

(April 9, 1969.)

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.